

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|---|---|----------------------|
| CARMEN PEREDA |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 1,008,849 |
| ARAMARK/WESLEY MEDICAL CENTER |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| LUMBERMENS MUTUAL CASUALTY COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Respondent and its insurance carrier appealed the November 16, 2005, Award entered by Special Administrative Law Judge Marvin Appling. After reviewing the record and the parties' briefs to this Board, the Board placed this appeal on its summary docket for disposition without oral arguments.¹

APPEARANCES

Kevin T. Stamper of Wichita, Kansas, submitted a brief to the Board on behalf of claimant. Matthew J. Schaefer of Wichita, Kansas, submitted a brief to the Board on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are set forth in the Award.

ISSUES

The parties stipulated claimant sustained personal injury by accident arising out of and in the course of her employment with respondent from April 25, 2002, and each

¹ January 24, 2006, is the date arguments were presented to the Board for purposes of K.S.A. 2004 Supp. 44-551(b)(1).

workday afterwards.² In the November 16, 2005, Award, Judge Appling held claimant sustained a 15 percent whole person functional impairment due to cubital tunnel syndrome in her right arm. But rather than computing claimant's permanent disability benefits using the schedule in K.S.A. 44-510d for a right arm injury, the Judge computed claimant's permanent disability benefits under K.S.A. 44-510e.

Respondent and its insurance carrier contend Judge Appling erred. They argue claimant injured her low back at work and, therefore, should receive permanent partial general disability benefits under K.S.A. 44-510e for a four percent whole person functional impairment. They arrived at that functional impairment rating by averaging the functional impairment ratings provided by Dr. Paul S. Stein and Dr. Philip R. Mills. Accordingly, respondent and its insurance carrier request the Board to modify the Award.

On the other hand, claimant contends the Award should be affirmed, even though claimant continues to argue that she permanently injured her "back, neck, and upper extremities."³

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After examining the record and considering the parties' arguments, the Board finds and concludes the November 16, 2005, Award should be modified.

As indicated above, the parties stipulated claimant injured herself while working for respondent from April 25, 2002, and every day she worked after that date. The parties also stipulated claimant's injuries arose out of and in the course of her employment with respondent. Claimant testified she terminated her employment with respondent on August 14, 2004.

Respondent operates a medical center in Wichita, Kansas. Claimant's job was pulling bags of dirty laundry onto a conveyor. Claimant did not know how much the bags weighed but she felt they were heavy. Claimant testified that on April 25, 2002, she began having symptoms in her low back, collarbone, right shoulder, right leg, and right arm.

Claimant reported her symptoms to respondent and she was referred for medical treatment. Claimant first saw Dr. Mark S. Dobyns, who initially examined claimant on May 7, 2002, and diagnosed a mild lumbar sprain. Dr. Dobyns released claimant to return to work with restrictions, prescribed medications, and instructed claimant to return in a week.

² Claimant worked for respondent through August 14, 2004.

³ Claimant's Brief at 1 (filed Jan. 11, 2006).

Claimant returned to Dr. Dobyns on May 17, 2002. At that visit, the doctor noted claimant had neither radiculopathy nor low back spasm, although she did have tenderness across her low back for which the doctor prescribed some physical therapy. Claimant saw Dr. Dobyns a third time on May 31, 2002. Because claimant denied she had significantly improved, the doctor ordered an MRI. When claimant's MRI failed to reveal any abnormality, Dr. Dobyns referred claimant to Dr. Frederick R. Smith for a second opinion. Dr. Dobyns noted in his June 12, 2002, office notes that claimant denied she was having radiculopathy.

Dr. Smith first saw claimant on July 9, 2002, and diagnosed soft tissue pain. The doctor changed claimant's medications, continued her work restrictions, and recommended that claimant see her family doctor for a physical exam, including blood work and a pelvic examination to rule out other causes that could be contributing to her back pain. Dr. Smith noted claimant had a good deal of emotional overlay that was magnifying her pain. After seeing claimant in late July and early August 2002, Dr. Smith requested approval to refer claimant to a pain specialist. But, according to Dr. Smith's records, the referral was not approved as, instead, respondent's insurance carrier desired claimant to be evaluated by Dr. Philip R. Mills.

Comments regarding claimant's thoracic spine first appear in Dr. Smith's August 23, 2002, office records. Moreover, Dr. Smith, who last saw claimant in November 2002, noted claimant was then complaining of continuing low back pain and right cervicothoracic pain, which was a new complaint. Like Dr. Dobyn's records, there is no mention in any of Dr. Smith's office notes of leg or arm symptoms. Instead, Dr. Smith's November 21, 2002, records indicate claimant denied her symptoms went into her upper extremity. Knowing Dr. Mills had recommended that claimant only lift with good body mechanics and lift no more than 35 pounds, Dr. Smith further restricted claimant to occasional bending, from lifting greater than five pounds with her right upper extremity, and from forceful repetitive pushing or pulling with that arm. In addition, Dr. Smith agreed with Dr. Mills' whole person functional impairment rating.

On September 3, 2002, Dr. Mills, who is board-certified in physical medicine, examined claimant on behalf of respondent and its insurance carrier. Dr. Mills diagnosed low back sprain and rated claimant as having a five percent whole person functional impairment as measured by the AMA *Guides*⁴ (4th ed.). Claimant completed a pain drawing for Dr. Mills. That pain drawing, however, did not indicate claimant had any symptoms in her legs or neck. As indicated above, Dr. Mills recommended that claimant not lift more than 35 pounds and that she only lift using good body mechanics.

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

Claimant sought another opinion from Dr. Douglas Woolley. At their first visit, which was December 16, 2002, claimant complained of low back pain, which she told the doctor had persisted for about eight months. Claimant also complained of right arm pain and pulling in her shoulder, which she told the doctor had persisted for at least two or three months. Claimant had a normal low back examination. But, more revealing, the doctor concluded claimant had an abnormal gait that was both nonphysiologic and inconsistent. Claimant again complained of right shoulder symptoms when she saw the doctor on December 23, 2002. Dr. Woolley noted claimant had unusual upper extremity posturing and that she had a nonphysiological release when he tested the right upper extremity. The doctor, however, found claimant had excellent range of motion in her shoulder, elbows, and wrists.

Claimant returned to Dr. Woolley's office on February 3, 2003. It appears claimant saw a nurse practitioner, who prescribed medications and advised claimant to ice her right arm and shoulder two to three times a day, gave claimant exercises for the low back and a handbook regarding the care of her shoulder. The nurse practitioner also told claimant to follow up with Dr. Woolley at her convenience. Again, the Board notes that Dr. Woolley's records do not indicate that claimant was having radiculopathy into her legs.

At her attorney's request, in late March 2003 claimant saw Dr. Pedro A. Murati to be examined and evaluated. Claimant told the doctor she had low back pain and cramping in her leg, low back pain that radiated down into her right leg, right shoulder pain radiating up into her neck, and right upper back pain. Dr. Murati diagnosed low back pain secondary to right-sided radiculopathy, right rotator cuff sprain or tear, bilateral carpal tunnel syndrome, right ulnar cubital syndrome, and myofascial pain syndrome affecting the cervical spine and right shoulder. Dr. Murati, who is also board-certified in physical medicine, did not rate claimant following this examination as he suggested various forms of treatment.

Claimant saw Dr. Murati again at her attorney's request in March 2004. At that visit claimant complained of low back pain radiating into her right leg, along with pain in her neck and upper back. According to claimant, her right shoulder pain had improved. Dr. Murati again found claimant had low back pain secondary to right-sided radiculopathy, bilateral carpal tunnel syndrome, and right ulnar cubital syndrome. But the doctor's diagnoses somewhat differed from those in March 2003 as this time he found claimant's right rotator cuff symptoms had resolved and her myofascial pain syndrome now affected both shoulder girdles and the cervical paraspinals. The doctor rated claimant as having a 29 percent whole person functional impairment as measured by the *AMA Guides* (4th ed.).

In calculating claimant's impairment rating, Dr. Murati concluded claimant had a 10 percent whole person functional impairment rating for her low back pain and radiculopathy,

a five percent whole person impairment for the pain syndrome in her cervical paraspinals, a 10 percent impairment to her right upper extremity due to carpal tunnel syndrome, a 10 percent impairment to her right upper extremity due to cubital tunnel syndrome, and a 10 percent impairment to her left upper extremity due to carpal tunnel syndrome.

Between visits with Dr. Murati, claimant saw neurological surgeon Dr. Paul S. Stein. Dr. Stein examined claimant in late July 2003 upon behalf of respondent and its insurance carrier. According to Dr. Stein's medical report, claimant complained of pain in her lower back with discomfort going up her back and into both arms, right greater than left. It is noteworthy Dr. Stein found a nonanatomic, stocking-like hypesthesia in the left leg just below the knee. The doctor found multiple signs of nonorganic low back pain and symptom magnification. In addition, Dr. Stein did not find any radiculopathy and rated claimant's impairment under the *AMA Guides* (4th ed.) at three percent. Dr. Stein wrote, in part:

Examination is marked by multiple Waddell's signs of nonorganic low back pain. There is no indication of radiculopathy. MRI scan report and films were not available to me but Dr. Dobyns interpreted this as normal and Dr. Murati as only a bulge at L4-5. I see no indication for additional investigation or treatment, she is at maximum medical improvement for this injury and probably has been for some time.

Dr. Mills provided and *[sic]* impairment rating of 5% to the body as a whole on 9/3/02 based upon DRE lumbosacral category II from the *AMA Guides to the Evaluation of Permanent Impairment*, fourth edition. Based upon today's examination I would consider that somewhat generous because of the signs of symptom magnification that are present and would place her between category I and II, 3% whole person impairment. I don't know of any structural basis upon which to place restriction of activity. These are based primarily on her complaints of pain, but I would have no strong argument with a 35-pound lifting limit placed by Dr. Mills.⁵

Claimant has not worked since leaving respondent's employment in August 2004. Claimant, however, has not attempted to prove a permanent partial general disability greater than her functional impairment rating. Accordingly, claimant requests the Board award her permanent disability benefits under K.S.A. 44-510e based upon her whole person functional impairment rating.

Considering the opinions and records from the various medical providers, the Board is persuaded that claimant injured her low back working for respondent and that her low back injury comprises a five percent whole person functional impairment as measured by

⁵ Stein report at 4 (Stipulation with Stein report filed Feb. 11, 2005).

the *AMA Guides* (4th ed.). Consequently, claimant is entitled to receive benefits for a five percent permanent partial general disability for that low back injury. In this instance, the Board is not persuaded by Dr. Murati's opinions as his findings and ratings appear somewhat embellished in light of the complaints claimant provided her medical providers and their findings.

AWARD

WHEREFORE, the Board modifies the November 16, 2005, Award entered by Special Administrative Law Judge Marvin Appling, as follows:

Carmen Pereda is granted compensation from Aramark/Wesley Medical Center and its insurance carrier for accidental injury from April 25, 2002, through her last day of work on August 14, 2004. Based upon an average weekly wage of \$316.28, Ms. Pereda is entitled to receive 20.75 weeks of permanent partial general disability benefits at \$210.86 per week, or \$4,375.35, for a five percent permanent partial general disability, making a total award of \$4,375.35, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director